Supreme Court, U.S.
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No. 98-1501

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THE CONLON GROUP, INC.,
Petitioner,

v.

THE CITY OF ST. LOUIS,
Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI OF RESPONDENT THE CITY OF ST. LOUIS

THOMAS J. RAY
City Counselor

EDWARD J. HANLON*
Deputy City Counselor

**Counsel of Record*

Office of the City Counselor for the
City of St. Louis
Room 314 City Hall
1200 Market Street
St. Louis, Missouri 63103
314-622-3361

Attorneys for Respondent

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI OF RESPONDENT CITY OF ST. LOUIS

Respondent City of St. Louis respectfully requests that this Court deny the petition for writ of certiorari seeking review of a decision of the Missouri Supreme Court denying transfer of the case below from the Missouri Court of Appeals, Eastern District. That decision is reported at 980 S.W.2d 37 (Mo. App. E.D. 1998).

STATEMENT OF THE CASE

Petitioner Conlon Group filed the action below seeking damages for the alleged taking or damaging of its real property, commonly known as the Syndicate Trust and Century Buildings. In its First Amended Petition, plaintiff Conlon Group claimed that it applied on May 30, 1995, for a permit to demolish these structures, which application was denied on or about June 30, 1995. Plaintiff alleged that the City denied its application for a demolition permit for the stated purpose of maintaining architectural quality and urban design which constitute a public use. According to plaintiff, this action prevented effective use of its property and diminished the value of the property.

In its answer, defendant City alleged that Conlon Group was precluded from claiming any right to demolish the Syndicate Trust and Century Buildings because it had entered into a redevelopment agreement with the Land Clearance for Redevelopment Authority of the City of St. Louis, as authorized by Ordinance 63073, under which Conlon Group agreed to renovate the buildings.

Conlon Group purchased the Syndicate Trust and Century Buildings from the Federal Deposit Insurance Corporation ("FDIC") in May, 1993, at a cost of $625,000.00. Petition for Certiorari, Appendix, pp. 3a. Shortly after purchasing the

buildings, Conlon Group decided to renovate the property by converting the lower floors to parking and refurbishing the upper floors for office space. Id., p. 4a. Conlon Group submitted this plan to the Land Clearance for Redevelopment Authority of the City of St. Louis (LCRA), (Id.), a public body separate from the City of St. Louis which is authorized, when approved by ordinance, to operate urban renewal programs in specified areas. Sections 99.130-99.660 R.S.Mo. LCRA approved the plan submitted by Conlon Group and thereafter the City of St. Louis adopted Ordinance 63073 approving the plan and authorizing a redevelopment agreement, under which Conlon Group was entitled to the benefit of tax abatement.[1] (Id.) In Paragraph 7 of the agreement, which Conlon Group executed, Conlon Group agreed to use the property as set forth in the approved Plan. (Id.) The redevelopment agreement specifically incorporated all of the provisions of Ordinance 63073. (Id.) Section Fifteen of Ordinance 63073 provided in part that, "[w]here a proposed modification will substantially change the Plan, the modification must be approved by the St. Louis Board of Aldermen in the same manner as the Plan was first approved." (Id.)

Conlon Group began preliminary interior demolition work to prepare for construction of parking facilities, but encountered unexpected problems which caused the cost of the project to increase beyond that originally anticipated. Id., p. 5a. Conlon Group then abandoned its original rehabilitation effort and sought issuance of a demolition permit from the City, so that Conlon Group could demolish the buildings, build a surface parking lot, and possibly build a parking garage at some point in the future. (Id.) Conlon Group conceded that this constituted a substantial modification of its original development plan and agreement, which required approval of the City of St. Louis

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[1] Tax abatement for such development projects is authorized by statute, Section 99.700 R.S.Mo.

Board of Aldermen. (Id.) Conlon Group never secured such approval. (Id.) The City of St. Louis denied Conlon Group's request for a demolition permit. (Id., pp. 5a-6a) Conlon Group then brought the action below seeking damages for a taking of its property by virtue of the denial of a demolition permit. (Id.)

The Circuit Court of the City of St. Louis held that plaintiff had established that a taking in violation of Article I, Section 26 of the Missouri Constitution had occurred, and awarded Conlon Group the sum of $4,259,387.00. (Id., pp. 23a-24a) The trial court rejected the City's contention that plaintiff was bound by the terms of Ordinance 63073 and the redevelopment agreement to rehabilitate the structures on the property rather than being entitled to demolish them.

On appeal, the Missouri Court of Appeals, Eastern District, reversed the circuit court's judgment, holding that Conlon Group was bound by the provisions of the redevelopment agreement and ordinance, which precluded it from demolishing the buildings. (Id., pp. 3a-10a).

REASONS FOR DENYING THE PETITION

I. The Petition Should Be Denied Because The Decision of the Missouri Court of Appeals, Eastern District, Does Not Involve Any Federal Issue and Petitioner Failed to Raise Any Federal Issue Before the Missouri Court of Appeals, Eastern District, or the Missouri Supreme Court.

In its decision, the Missouri Court of Appeals, Eastern District, determined that the City of St. Louis' action in denying petitioner Conlon Group a demolition permit to demolish the Syndicate Trust/Century Buildings did not violate Conlon Group's right to just compensation under Article I, Section 26 of the Missouri Constitution. The trial court, in its decision, had found the contrary. Neither decision, that of the state circuit court or the Missouri Court of Appeals, Eastern District, even mentions the takings clause of the Fifth Amendment to the United States Constitution, much less bases its decision on that provision.

This Court has frequently declined to address federal constitutional issues that were not raised or decided in the state court from which a petition originates. See, e.g., Adams v. Robertson, 520 U.S. 83 (1997); Yee v. Escondido, 503 U.S. 519 (1992); Webb v. Webb, 451 U.S. 493 (1981). Here, the decision of the Missouri Court of Appeals, Eastern District, does not address the issue sought to be presented by petitioner. In such cases, this Court assumes that the issue was not properly presented to the state court and the petitioner bears the burden of demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here." Webb v. Webb, 451 U.S. at 501. Petitioner has failed to demonstrate how and where it ever presented a Fifth Amendment issue to the Missouri Court of Appeals, Eastern District, or to the Missouri Supreme Court in its application for transfer. See Appendix, infra, A-1 – A-3. Nor does the decision of the circuit court, from which the

underlying appeal originated, even mention the Fifth Amendment. Petition for Writ of Certiorari, Appendix, pp. 11a-24a.

This Court should deny the petition because petitioner failed to raise in the state court below the issue it seeks to present to this Court.

II. The Petition Should Be Denied Because The Missouri Court of Appeals, Eastern District, Correctly Determined That Petitioner Voluntarily Relinquished Any Right to a Demolition Permit By Entering Into a Development Agreement Which Required That It Maintain The Buildings.

In its decision, the Missouri Court of Appeals, Eastern District, held that the case was properly analyzed as a contract case, not a takings case, and that Conlon Group had no right to a demolition permit to demolish the buildings because it had voluntarily relinquished any such right by entering into the redevelopment agreement. Petition for Writ of Certiorari, Appendix, pp. 9a-10a. This holding raises no compelling reason to justify review or certiorari. See Supreme Court Rule 10.

Petitioner falsely attempts to portray the decision of the Missouri Court of Appeals, Eastern District, as holding that Conlon Group "waived" its right to just compensation by entering into a redevelopment agreement. That decision says no such thing. It holds only that Petitioner gave up any right it might otherwise have had to the issuance of a demolition permit by entering into the redevelopment agreement, which required it to maintain the existing structures, and which in turn provided Petitioner with the benefits of exclusive development rights and tax abatement.

Even if this was an instance of "waiver" of the constitutional right to just compensation, petitioner is simply wrong in its assertion that this court has never before addressed the issue. Peition for Writ of Certiorari, p. 13. See Matson Navigation

Company v. United States, 284 U.S. 352, 357-358 (1932), holding that ship owner could, by contract, waive its constitutional right to just compensation.

Stripped of constitutional verbiage, Conlon Group's argument is that it need comply with the terms of the contract it entered into only when it is financially advantageous to do so. According to Petitioner, once a party to a contract with government realizes that it will lose money by carrying out its duties under the contract, a taking has occurred. In short, Petitioner contends that a party that contracts with government is constitutionally guaranteed it will never lose money. This Court has never approved such a proposition. It should not do so in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Thomas J. Ray, City Counselor
Edward J. Hanlon, Deputy City Counselor

Counsel of Record
Attorneys for Respondent

City of St. Louis
314 City Hall
1200 Market Street
St. Louis, MO 63103
314-622-3361